

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANIEL A. HAYDEN
Claimant

VS.

GENERAL MOTORS CORP.
Self-Insured Respondent

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Docket No. 1,028,284

ORDER

STATEMENT OF THE CASE

Claimant requested review of the Order Denying Request for Additional Permanency entered by Special Administrative Law Judge Gregory A. Lee entered July 9, 2012. The Board heard oral argument on October 19, 2012. The Director appointed Joseph Seiwert to serve as Appeals Board Member Pro Tem in place of former Board Member David A. Shufelt. Dennis L. Horner, of Kansas City, Kansas, appeared for claimant. Peter J. Chung, of Kansas City, Missouri, appeared for the self-insured respondent.

The Special Administrative Law Judge (SALJ) found that claimant is not entitled to review and modification of his previous award at this time because he is receiving ongoing medical treatment. Therefore, the SALJ found that any rating for permanent injury would be premature.

The Board has considered the following record: Transcript of Motion Hearing held July 24, 2008, with exhibit; Transcript of Settlement Hearing held June 4, 2007; Transcript of Regular Hearing held November 8, 2011; Deposition of James A. Stuckmeyer, M.D., held December 5, 2011, with exhibits; and Transcript of Motion Hearing held February 9, 2012, together with the pleadings contained in the administrative file.

ISSUES

Claimant suggests the SALJ should have decided this matter as of the time it was submitted to former Administrative Law Judge (ALJ) Marcia Yates in January 2012. Further, claimant argues that the evidence shows he is entitled to an increase in his permanent partial disability from 22.5 percent to 75 percent. Claimant also questioned

whether the SALJ's Order preserved his right to seek another review and modification in the future.

Respondent argues that the SALJ was correct in deferring a decision on increased impairment until claimant has reached maximum medical improvement and, accordingly, the Order Denying Request for Additional Permanency should be affirmed.

The issues for the Board's review are:

(1) Is claimant at maximum medical improvement? Did he prove he is entitled to an increase in his permanent partial disability from 22.5 percent to 75 percent?

(2) Does the SALJ's Order preserve claimant's right to seek another review and modification in the future?

FINDINGS OF FACT

Claimant injured his right knee on December 28, 2005. He and respondent entered into a compromise settlement of his claim on June 4, 2007. The settlement was based on an award of 22.5 percent to the right lower extremity at the level of the leg. Claimant's rights to future medical and review and modification were left open.

Claimant filed an Application for Post Award Medical on April 14, 2008, and on June 4, 2008, former ALJ Robert Foerschler entered an Order granting claimant additional medical treatment with Dr. Robert Paul. On November 2, 2009, claimant filed an Application for Preliminary Hearing, asking for authorization for a total right knee replacement; an Application for Review and Modification; and an Application for Post Award Medical. There is no order in the Division's record on the Application for Preliminary Hearing and Application for Post Award Medical. Nevertheless, claimant underwent right knee replacement surgery in January 2010, which was performed by Dr. Paul. He went through physical therapy after the knee replacement.

A Regular Hearing was scheduled in this matter on November 8, 2011. At that time, ALJ Yates stated:

This is a post-award review and modification hearing. The claimant previously settled his claim for 22.5 percent of the knee. I believe it's the right knee.

...
... Then subsequent to that settlement hearing, he has had a total knee replacement. So this hearing is to reflect any additional impairment he may have sustained over and above that original 22 and 1/2 percent that was previously paid
...¹

¹ R.H. Trans. (Nov. 8, 2011) at 3-4.

At the regular hearing, claimant testified that since his total right knee replacement surgery, he has a constant aching pain in his right knee. He cannot stand very long or do any prolonged walking or his right knee hurts and swells. He has swelling in his knee every day. He cannot bend down and cannot squat and get back up. He can bend his right knee, but it is painful to do so. His right knee gives away causing his leg to buckle, and he sometimes falls. This happens from 10 to 12 times a month. He has problems sleeping. Claimant said he has a slight limp most of the time, but if he does any prolonged standing or walking, the limp gets worse. He has difficulty ascending and descending stairs.

After hearing testimony from claimant, ALJ Yates set terminal dates. Claimant's terminal date was set for December 2, 2011, and respondent's terminal date was set for January 4, 2012. On November 29, 2011, claimant's attorney filed a motion for an extension of his terminal date to December 9, 2011. Although there is no order signed by ALJ Yates extending this terminal date, the Workers Compensation Division's electronic database indicates that on December 1, 2011, claimant's terminal date was extended to December 9, 2011. No change was made to respondent's terminal date.

Claimant took the deposition of Dr. James A. Stuckmeyer on December 5, 2011. Dr. Stuckmeyer, a board certified orthopedic surgeon, initially examined claimant on December 15, 2006, at the request of claimant's attorney. In reviewing the medical records of Dr. Paul, Dr. Stuckmeyer noted that claimant had right knee patellofemoral Grade 4 chondromalacia, synovitis in all three compartments. After review of claimant's medical records and performing a physical examination, Dr. Stuckmeyer suggested that claimant might benefit from Synvisc injections to see if it would buy claimant some time before he needed a total knee replacement. Based on the *AMA Guides*,² Dr. Stuckmeyer rated claimant as having a 25 percent permanent partial impairment to his right lower extremity at that time.

Dr. Stuckmeyer evaluated claimant a second time on March 28, 2011. At that time, the physical examination revealed that claimant had undergone a total knee replacement. Claimant had full extension of his right knee but had limitations in flexion. Claimant's right knee was stable, but he continued to have swelling within the joint. Claimant had an obvious antalgic gait. Claimant told Dr. Stuckmeyer that his situation was worse than it was before the total right knee replacement. Dr. Stuckmeyer recommended claimant have a bone scan and hematological studies to rule out possible loosening of the prosthetic device or an infection. He also believed that claimant would likely need additional surgical intervention. Dr. Stuckmeyer said that even if claimant was not experiencing loosening of the prosthetic device or infection, he would most likely need another knee replacement in the future because of his age. Dr. Stuckmeyer said it is possible that the results of a

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

second total knee replacement for claimant would be better than the results of the first replacement.

Dr. Stuckmeyer opined that claimant had suffered a poor result of the knee replacement. Using the *AMA Guides*, Dr. Stuckmeyer rated claimant as having a 75 percent permanent partial impairment to his right lower extremity. Dr. Stuckmeyer testified he did not strictly use the point system in the *AMA Guides* in rating claimant's knee replacement result; instead he used his experience and various tables from the *Guides* to come up with his rating.

On January 24, 2012, respondent filed a Motion for Extension of Terminal Date, claiming a delay in getting a report from the authorized treating physician, Dr. Paul, and the inability to schedule Dr. Paul's deposition. Respondent also filed its Notice to Take Deposition of Dr. Robert Paul, which was scheduled for February 8, 2012. On January 25, 2012, claimant filed a response to respondent's motion for extension, arguing that respondent's attorney had not contacted claimant's attorney about extending the terminal date or scheduling a deposition of Dr. Paul until January 20, 2012, which was after respondent's terminal date of January 4, 2012. Claimant also filed a motion to quash the scheduled deposition of Dr. Paul. Notwithstanding the fact that claimant's attorney was unable to be present at a deposition of Dr. Paul on February 8, 2012, respondent's attorney went forward with the deposition.

ALJ Yates entered a Preliminary Decision on February 9, 2012, denying respondent's request for an extension of its terminal date and granting claimant's motion to quash the scheduled deposition of Dr. Paul. A copy of the Preliminary Decision was emailed to counsel for the parties on February 9, 2012.

Gregory A. Lee was appointed special administrative law judge in this case on April 11, 2012. On April 25, 2012, SALJ Lee entered an Order Authorizing Post-Award Medical Care, finding that "Claimant is entitled to additional medical treatment. Therefore, Respondent is obligated to compensate Claimant for all continuing and future medical care deemed necessary by Dr. Stuckmeyer, whom the Court hereby deems an authorized treating physician pursuant to K.S.A. 44-510h."³ On July 9, 2012, SALJ Lee entered his July 9, 2012, Order Denying Request for Additional Permanency, which is the basis of this appeal.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the

³ SALJ Order Authorizing Post-Award Medical Care (Apr. 25, 2012) at 2.

claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. K.S.A. 44-528 provides in part:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. . . . The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds . . . that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

In *Morris*,⁴ the Kansas Court of Appeals stated:

There is no doubt . . . that the purpose of the modification and review statute was to save both the employer and the employee from original awards of compensation that might later prove unjust because of a change for the worse or better in a particular claimant's condition. [Citations omitted.]

In *Quandt*,⁵ the Kansas Court of Appeals held:

An award under K.S.A. 44-528 modifying an earlier award of benefits is an entirely new award separate and distinct from the one it modifies. Thus, the same legal principles which control an initial award of compensation generally apply to an award under K.S.A. 44-528, the modification and review statute.

K.S.A. 2010 Supp. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative

⁴ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979)

⁵ *Quandt v. IBP*, 38 Kan. App. 2d 874, Syl. ¶ 5, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008)

law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

K.S.A. 44-534a(a) states:

(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of

and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Siler*,⁶ the Kansas Court of Appeals stated:

When a workers compensation settlement leaves the issue of future medical payments open, an administrative law judge's preliminary order under K.S.A. 44-534a regarding those payments is not a termination or modification of the award.

....

When the parties do not agree on future medical treatment that has been left open in a workers compensation settlement award, the administrative law judge has jurisdiction to hear the issue under K.S.A. 44-534a.

No workers compensation preliminary finding or preliminary award is appealable by any party, and the same shall not be binding in a full hearing on the claim.

In *Perla*,⁷ the Board held:

The preliminary hearing statute, K.S.A. 44-534a, by its terms, does not preclude the use of the preliminary hearing procedure to obtain medical treatment and/or temporary total disability compensation post award, that is, unless the term "preliminary" is defined as meaning prior to the entry of a final award. The Kansas Court of Appeals approved the use of the preliminary hearing procedure to determine a claimant's right to medical treatment post award in *Siler*. The ALJ distinguished *Siler* from the case at bar because in *Siler*, the application for

⁶ *Siler v. U.S.D. No. 512*, 45 Kan. App. 2d 586, Syl. 1, 5, 6, 251 P.3d 92 (2011), *rev. denied* 293 Kan. __ (2012).

⁷ *Perla v. Fry Wagner Moving & Storage*, No. 1,051,775, 2012 WL 2061767 (Kan. WCAB May 1, 2012).

preliminary hearing was filed by the respondent, not by the claimant, as in this case. However, the Court of Appeals in *Siler* also said that the preliminary hearing procedure was equally available to both claimants and respondents.

ANALYSIS

The SALJ ordered additional medical treatment in his order of April 25, 2012. In the Order of July 9, 2012, the SALJ ruled claimant was not at maximum medical improvement and therefore review and modification of claimant's permanent partial disability was premature. This is an interlocutory order. This appeal is premature because there is no final order. The Application for Review and Modification is still pending.

CONCLUSION

The Board is without jurisdiction to review the SALJ's Order of July 9, 2012.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the appeal from the Order Denying Request for Additional Permanency of Special Administrative Law Judge Gregory A. Lee dated July 9, 2012, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

BOARD MEMBER

BOARD MEMBER

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